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IN THE

Supreme Court of the United States

October Term, 1967

No. 765

RUSSEL MILTON WILLS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RUSSEL MILTON WILLS, *Petitioner,* v. UNITED STATES OF AMERICA, *Respondent.*	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the October 3, 1967, judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case.

CITATIONS TO OPINIONS BELOW

Honorable William T. Beeks, United States District Judge, United States District Court for the Western District of Washington, Northern Division, gave a memorandum decision, unreported, on September 23, 1966, denying petitioner's motion to dismiss and finding petitioner guilty as charged. This opinion is printed in the Appendix hereto, App. A-11.[1] The opinion of the United States Court of Appeals is printed at App. A-2; it has not yet appeared in the Official Federal Reporter.

JURISDICTION

The judgment of the United States Court of Appeals

1. "App. . . ." refers to the Appendix hereto.

for the Ninth Circuit was entered on October 3, 1967, App. A-1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (I).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the action of Local Selective Service Board No. 47 in declaring petitioner a delinquent for "destroying his registration certificate" was beyond the jurisdiction of the Board and therefore invalid such that the I-A Classification and Order to Report for Induction following upon that declaration of delinquency were also void and invalid.

2. Assuming that such action by Local Selective Service Board No. 47 was within its jurisdiction, whether making petitioner a delinquent for "destroying his registration certificate" and so classifying him I-A was an unconstitutional abridgement of petitioner's freedom of expression because the conduct sought to be punished was a peaceful act of symbolic speech.

3. Whether making petitioner a delinquent for "destroying his registration certificate" and classifying him I-A in reliance upon the August 30, 1965, amendment to Section 12 (b)(3) of the Universal Military Training and Service Act, 50 U.S.C. App. §462 (b)(3) was invalid and void because the statute on its face and as so applied is an unconstitutional abridgement of petitioner's freedom of expression, in that the conduct which the Act and the Selective Service Board sought to punish was a peaceful act of symbolic speech.

4. Assuming the conclusion of law of the Circuit Court of Appeals that "Destruction is, in fact, no more than a willful and defiant refusal to possess", and that "the two

offenses are in truth but one", whether as so applied 50 U.S.C. App. §462 (b)(6), implemented by 32 C.F.R. 1617.1, requiring registrant to "have in his personal possession at all times his Registration Certificate", are an unconstitutional abridgement of petitioner's freedom of expression, because the conduct sought to be punished was and is a peaceful act of symbolic speech.

5. Whether 50 U.S.C. App. §462 (b)(3), which makes it a felony to knowingly destroy or knowingly mutilate a Selective Service Certificate, serves any legitimate purpose in the administration of the Selective Service System, or has any other rational legislative purpose, and whether, in the absence of any legitimate or rational legislative purpose, the statute is an unconstitutional deprivation of petitioner's individual liberty without due process of law, in violation of the Fifth Amendment.

6. Whether 50 U.S.C. App. § 462 (b)(6), implemented by 32 C.F.R. 1617.1, requiring registrant to "have in his personal possession at all times his Registration Certificate" serves any legitimate purpose in the administration of the Selective Service System, or has any other rational legislative purpose, and whether, in the absence of any legitimate or rational legislative purpose, on its face and as applied to the facts of this case, the statute is an unconstitutional deprivation of petitioner's individual liberty without due process of law, in violation of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the First and Fifth Amendments to the United States Constitution.

(1) *First Amendment*:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(2) *Fifth Amendment*:

"No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. A statute involved is 50 U.S.C. App. §462 (a):

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [§§ 451, 453, 454, 455, 456 and 458-571 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

3. Another statute involved is P.L. 89-152, 79 Stat. 586, enacted August 30, 1965, which adds certain language to Section 12 (b)(3) of the Act (as hereafter underscored), 50 U.S.C. App. §462 (b)(3), and 50 U.S.C. App. §462 (b)(6), as follows:

> "(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451-454, 455-471 of this Appendix); or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate

for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury."

4. The Regulation involved is 32 C.F.R. §1617.1 as follows:

"§1617.1 *Effect of failure to have unaltered registration certificate in personal possession.*

"Every person required to present himself for and submit to registration must, after he is registered, have in his personal possession at all times his Registration Certificate (SSS Form No. 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form No. 2) in his personal possession shall be *prima facie* evidence of his failure to register. . . ."

STATEMENT OF THE CASE

Petitioner was indicted July 27, 1966, in the United States District Court for the Western District of Washington, Northern Division, for a violation of 50 U.S.C. App. §462 (a), and 32 C.F.R. 1632.14, in that on or about February 24, 1966, at Seattle, Washington, he did knowingly, willfully and unlawfully fail, neglect and refuse to perform a duty required of him by the Universal Military Training and Service Act, and the rules, regulations and directions made pursuant thereto, in that, having been duly and regularly ordered by a local Selective Service Board to report and submit to induction into the Armed Forces of the United States of America, he failed, neglected and refused to be inducted.

On October 15, 1965, petitioner, a married student with a II-S Selective Service Classification, wrote a letter to his draft board in Berkeley, California; the letter was

received by that draft board on October 19, 1965. The letter reads:

> "This is to inform your office that 1, I have intentionally destroyed my draft card and will henceforth refuse to carry another. 2, I have signed the C.N.V.A. petition, with which I am sure you are familiar. 3, I will refuse to cooperate with your office in any manner whatsoever. If you wish to take any measures against me, you can contact me at the following address . . .
>
> "My reasons for these actions are purely patriotic. They may be found in the Declaration of Independence, The U. S. Constitution, and the Nurenburg Judgment. I won't bore you with details since I presume that you have heard them often. History will judge both of us, and one will be declared an unintentional murderer. It will not be me."

On October 21, 1965, petitioner's local draft board declared petitioner to be a delinquent, inserting in his selective service cover sheet as the reason for its action, "destroyed reg. card"; on October 23, 1965, Selective Service Form 110 was mailed to petitioner advising him that he had been classified I-A. No reason for the I-A classification was given to petitioner. Petitioner did not request a personal appearance before his local board, or take an appeal of the I-A classification.

On January 3, 1966, petitioner was mailed Selective Service Form 304, Delinquency Notice, which was dated October 21, 1965, and which advised petitioner:

> 1. "You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service law:
>
> Destroyed his registration certificate.
>
> 2. "You are hereby directed to report to this Local

Board immediately, either in person or by mail.

3. "Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, which is punishable by imprisonment for as much as 5 years or a fine of as much as $10,000.00, or by both such fine and imprisonment."

On January 31, 1966, petitioner was ordered to report for induction in Seattle, Washington, and on February 24, 1966, petitioner refused induction. The indictment followed. Petitioner pleaded not guilty and waived a jury trial. After hearing, and after a timely motion to dismiss the indictment, Honorable William T. Beeks denied petitioner's motion to dismiss, adjudged petitioner to be guilty, and sentenced him to five years imprisonment. App. A-9. The judgment and opinion of the Ninth Circuit Court of Appeals rendered October 3, 1967, affirmed the judgment of conviction. App. A-2.

REASONS FOR GRANTING WRIT

Certiorari should be granted because the Court of Appeals erroneously avoided a consideration of the constitionality of 50 U.S.C. App. §462 (b)(3) which makes it a felony to knowingly destroy or knowingly mutilate a Selective Service Certificate. Also erroneously avoided by the Court of Appeals was a consideration of the effect of that statute when applied by petitioner's draft board to make petitioner a delinquent for his peaceful and protesting act of destroying his Registration Certificate. These are important questions of federal law which have not been, but should be, settled by this court.

I.

The Court of Appeals erroneously avoided consideration of 50 U.S.C. App. §462 (b)(3), and its effect on

petitioner's constitutional rights by concluding that petitioner's act of destruction was included in, and encompassed by 50 U.S.C. App. §462 (b)(6) which, implemented by 32 C.F.R. 1617.1, requires registrant to "have in his personal possession at all times his Registration Certificate". Having concluded that destruction is equivalent to or results in a lack of personal possession by a registrant, the Court of Appeals then refused to consider the constitutionality of 50 U.S.C. App. §462 (b)(3) even though petitioner's local selective service board had declared him a delinquent for the stated reason, "Destroyed his registration certificates," and the Court of Appeals further refused to consider the constitutionality of 50 U.S.C. App. §462 (b) (6) as applied by it to petitioner.

II.

Subsequent to the decision of the Court of Appeals for the Ninth Circuit in *Wills v. United States*, this court granted certiorari in No. 232, *U. S. v. O'Brien*, and in No. 233, *O'Brien v. U. S.*, to consider two questions:

> 1. "Does First Amendment protect Selective Service Registrant from conviction under 50 U.S.C. App. 462 (b)(3) for burning his draft card?" (No. 232, 1967-1968 Term, *U. S. v. O'Brien*, 36 L.W. 3125).
>
> 2. "Was Selective Service registrant deprived of due process when, court of appeals reversed his conviction under 50 U.S.C. App. 462 (b)(3) for burning his draft card, but held that he stood convicted under 462 (b)(6) for failing to keep draft card in his possession, an offense of which he had not been charged or tried?" (No. 233, 1967-1968 Term, *O'Brien v. U. S.*, 36 L.W. 3126).

Whether or not this court upholds 50 U.S.C. App. §462 (b)(3) in the face of a First Amendment challenge, and whether or not a conviction of O'Brien under 50

U.S.C. App. §462 (b)(6) be allowed to stand, in the circumstances disclosed in *O'Brien v. U. S.*, No. 233, there are important related questions of federal law in the instant case which have not been, but should be settled by this Court. These related questions of federal law hereafter set forth are current, affect thousands of selective service registrants, and have pertinence to the present operation of the Selective Service System; the answers to the following questions of federal law will influence, limit, and define the freedom of selective service registrants to peacefully protest against the war in Viet Nam, against the draft law, and perhaps other objects of protest.

A. If 50 U.S.C. App. §462 (b)(3) be held constitutional in *U. S. v. O'Brien*, No. 232, there remains the question discussed and resolved by the Second Circuit Court of Appeals in *Wolff v. U. S.*, 372 F.2d 817 (C.A. 2, 1967): Can Selective Service Board No. 47 apply that statute to a registrant if no regulation affecting the Selective Service System authorizes a draft board to declare a registrant a delinquent or to reclassify him for destroying his registration certificate?

B. If 50 U.S.C. App. §462 (b)(3) be held unconstitutional in *U. S. v. O'Brien*, No. 232, can a Selective Service Board nevertheless make a registrant delinquent for a claimed violation of that statute?

C. If this court holds in *O'Brien v. U. S.*, No. 233, that the registrant was deprived of due process when the Court of Appeals reversed his conviction under 50 U.S.C. App. §462 (b)(3) for burning his draft card, yet held that he stood convicted under 50 U.S.C. App. §462 (b)(6) for

failure to keep his draft card in his possession, then it must follow that a draft board cannot give a reason for delinquency based on 50 U.S.C. App. §462 (b)(3), and be supported in its declaration of delinquency upon the unexpressed reason of failure to possess his Selective Service Certificate, grounded *sub silentio* upon 50 U.S.C. App. §462 (b)(6).

D. Even if this court holds the procedure of the Court of Appeals not to be violative of O'Brien's right to due process, a Selective Service Board, untrained in the law, acting without benefit of a hearing or trial for a registrant, not guided by a criminal standard of proof, should not be able to assert delinquency because registrant destroyed his Selective Service Certificate, only to be supported in its administrative decision by a reviewing court treating a failure to possess as an "included offense" within the stated reason for delinquency, that of destruction of a Selective Service Certificate.

III.

All questions presented by this case raise the issue of petitioner's right to rely upon the First Amendment in his peaceful act of symbolic speech, in his writings explaining the symbolic act of destroying his Selective Service Card, and in communicating his protest directly to his local draft board.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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